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In the Supreme Court of the United States

[redacted]

JOEL D. KERSEY, JR.
and
LOUIS RAY FREEMAN,
Petitioners,

v.

[redacted]

QUESTION PRESENTED FOR REVIEW

(a) Whether, after petitioners were terminated because of their refusal to undergo a polygraph examination and after petitioners elected to have their termination reviewed pursuant to the provisions of the Law Enforcement Officers' Procedural Guarantees, Va. Code §2.1-116.1 et seq. (Repl. Vol. 1979), as amended, were the procedural guarantees of the statute complied with by respondents?

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No. 81 - 2311

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1981

JOEL D. KERSEY, JR.,
and
LOUIS RAY FREEMAN,

Petitioners,

v.

I.M SHIPLEY, JR.,
R. A. LAKOSKI,
JOHN T. MAXWELL,
and
CITY OF CHESAPEAKE,

Respondents.

BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

QUESTION PRESENTED FOR REVIEW

(a) Whether, after petitioners were terminated because of their refusal to undergo a polygraph examination and

after petitioners elected to have their termination reviewed pursuant to the provisions of the Law Enforcement Officers' Procedural Guarantees, Va. Code §2.1-116.1 et seq. (Repl. Vol. 1979), as amended, were the procedural guarantees of the statute complied with by respondents?

MATERIAL PROCEEDINGS AND OPINIONS BELOW

Petitioners, Joel D. Kersey, Jr. and Louis Ray Freeman, were Chesapeake City police officers. The respondents - I. M. Shipley, Jr., acting Chief of Police; R. A. Lakoski, Chief of Police; John T. Maxwell, City Manager - were employed by respondent, City of Chesapeake.

On May 3, 1979, petitioners, having refused to obey acting Chief Shipley's order to take a polygraph

examination during the course of an administrative investigation, were terminated from their employment by Chief Lakoski. Petitioners requested a review hearing under the Virginia Law Enforcement Officers' Procedural Guarantees statute, Va. Code §2.1-116.5 (Cum. Supp. 1982). The hearing panel's 2-1 recommendation, advisory only, that the petitioners be reinstated as police officers, was rejected by Chief Lakoski, who continued their termination. The Chief's decision was reviewed and sustained by City Manager, Maxwell.

On May 19, 1980, petitioners filed a Complaint in the United States District Court for the Eastern District of Virginia, Norfolk Division, challenging respondents' actions as arbitrarily and

capriciously depriving them of their rights to due process of law under the Fifth and Fourteenth Amendments of the Constitution of the United States, 42 U.S.C. §1983, and 18 U.S.C. §245, further alleging a violation of their rights under Code of Virginia, §2.1-116.1, et seq, (Law Enforcement Officers' Procedural Guarantees), and requesting reinstatement as police officers and back wages.

At trial, following completion of petitioners' evidence, the District Court entered an Order on February 24, 1981 directing a verdict in favor of respondents and dismissing the action on the merits. The Fourth Circuit Court of Appeals affirmed the judgment on March 22, 1982. Kersey v. Shipley, 673 F.2d 730 (4th Cir. 1982).

JURISDICTION

Respondents received petitioners' petition for Writ of Certiorari on or about June 20, 1982, and respondents' Brief in Opposition follows within 30 days thereof.

STATEMENT OF THE CASE AND MATERIAL FACTS

(All references are to the appendix filed as part of the record to the Fourth Circuit and shall refer first to the transcript volume and then to the page).

Respondents acknowledge that this Court must review the facts in a light most favorable to petitioners, the parties against whom the motion for directed verdict was granted, and take all reasonable inferences therefrom. Nevertheless, respondents are dissatisfied

with petitioners' factual presentation, S.Ct.R. 34.2, believing it to contain significant omissions.

Resolution of this petition turns on nine chronologically significant events, whose importance is overlooked by petitioners. Before discussing them in detail as they relate to the petition, respondents will briefly set them out for reference:

May 11, 1972	Application for employment of petitioner, Joel D. Kersey, Jr., in which petitioner agreed to submit to a polygraph examination if so requested, and to assist in investigations of any complaint made against petitioner. (Def. Ex. C15; Vol. I, p. 134-136).
May 20, 1972	Application for employment of petitioner, Louis Ray Freeman, in which petitioner agreed to submit to a polygraph examination if so requested and to assist in any investigation of any

	complaint made against petitioner. (Def. Ex. C15; Vol. I, p. 134-136).
May 3, 1979	Petitioners ordered to take polygraph examination during an administrative inquiry into a citizen's complaint;
May 4-5, 1979	Petitioners refuse to take polygraph examination; written charge of disobeying a direct order;
May 22, 1979	Termination of petitioners' employment for failure to obey a direct order and failure to cooperate in an administrative inquiry;
May 24, 1979	Petitioners' letters to respondent, City Manager Maxwell, electing to proceed under Law Enforcement Officers' Procedural Guarantees statute in lieu of City of Chesapeake Grievance Procedure;
June 20, 1979	Law Enforcement Officers' Procedural Guarantees panel hearing;

July 24, 1979 Decision by Chief Lakoski that petitioners had disobeyed a direct order; May 22 termination to remain in effect;

August 14,1979 City Manager denies petitioners' request to be reinstated to active duty.

Following certain events on March 2, 1979, involving petitioners and Marlene June White, petitioners had criminal charges brought against them by Ms. White in the City of Norfolk. As a result, petitioners were suspended from the Chesapeake Police Department. After those charges were dismissed, the Chesapeake Police Department conducted an internal investigation concerning Ms. White's accusations. (Vol. II, p. 447, 571, 607). Colonel Shipley was appointed hearing officer for the investigation, and on May 3, he read and then handed to each

petitioner a letter ordering them to take a polygraph examination. (Agreed Ex. 3, 3A; Vol. I, p. 189-190). The next day, May 4, petitioners hand-delivered to Colonel Shipley their attorney's letter, recommending that they not take the polygraph examination. (Def. Ex. C11; Vol. I, p. 97).

On May 5, petitioners were advised that they were being charged with refusing to obey a direct order to take the polygraph examination. (Agreed Ex. 4, 4A; Vol. II,p. 466-467, 580-581). Petitioners' only response to the charge of disobeying a direct order was a letter from their counsel setting forth their basis for refusing to obey the order. (Def. Ex. C11, C12; Vol. I, p. 249-253, Vol. II, p. 320-322, 469, 526-528,

533-535, 626-627). Following a review of all the evidence concerning the order to take a polygraph examination and petitioners' refusal to obey that order (Vol. I, p. 252-255), Chief Lakoski, as agency head, terminated petitioners' employment and advised them of their administrative appeal rights through either the City of Chesapeake Grievance Procedure or the Law Enforcement Officers' Procedural Guarantees statute, Va. Code § 2.1-116.5 (Cum. Supp. 1982); petitioners elected the latter procedure.

A hearing was held on June 20, 1979, before a three-member panel consisting of one member chosen by petitioners, one member chosen by the agency head, Chief Lakoski, and the third member chosen by the two previously chosen

members. Petitioners' counsel examined both Chief Lakoski and Colonel Shipley at length at this hearing. The hearing panel, voting two-to-one, recommended that petitioners be reinstated as police officers. After reviewing all of the investigative reports and letters concerning the charge of disobeying a direct order, the hearing transcript itself, and the recommendations of the advisory panel, Chief Lakoski decided not to accept the panel's recommendations and continued petitioners' termination for disobeying a direct order. (Agreed Ex. 8, 8A; Vol. I, p. 114-116).

Petitioners then appealed the Chief's decision to the City Manager. Based upon his own review of the police reports, police investigation, other documentation, and the hearing panel

transcript, and considering the sole question whether petitioners had disobeyed a direct order, City Manager Maxwell upheld Chief Lakoski's decision to terminate petitioners' employment. (Agreed Ex. 10; Vol. II, p. 334-338, 347-348). Thereafter, petitioners instituted the civil rights action which is the subject of their petition for writ of certiorari.

REASONS FOR NOT GRANTING THE WRIT

A. Because petitioners elected to proceed under the Law Enforcement Officers' Procedural Guarantees statute, Va. Code §2.1-116.1 et seq. (Repl. Vol. 1979), as amended, rather than under the alternative procedures of the City of Chesapeake Grievance Procedure, their due process rights were those delineated under the Procedural Guarantees statute; each due process right afforded petitioners thereunder was fulfilled.

Petitioners do not now challenge, nor at any time in this litigation

have they challenged, either the procedures guaranteed to them under the Virginia Law Enforcement Officers' Procedural Guarantees statute, Va. Code §2.1-116.1, et seq. (Repl. Vol. 1979), as amended, or the constitutionality of that statute. In fact, petitioners admit that Chief Lakoski "complied with the Law Enforcement Officers' Procedural Guarantees statute . . . ." (Petitioners' Brief, p. 24). Petitioners argue, rather, that Chief Lakoski's literal compliance with the statute was clouded by subjective considerations. Those subjective considerations, however, were ruled upon by the Fourth Circuit Court of Appeals in sustaining the district court's judgment, and petitioners' argument notwithstanding, the facts do not demonstrate arbitrary and

capricious conduct resulting in a procedural due process violation.

1. Chief Lakoski was required by statute to appoint one of the hearing panel members.

The first deprivation of due process which petitioners assert is that it was Chief Lakoski, a person whom petitioners describe as being "adverse" to them, who appointed one of the three members of the hearing panel. Petitioners overlook the fact that the statute itself mandates an appointment of one member of the panel by the agency head, the Chief of Police. Va. Code §2.1-116.5.2 (Cum. Supp. 1982). Likewise, petitioners themselves were entitled to and did, in fact, appoint one member of the panel. Since the panel voted in petitioners' favor, they may not now be heard to complain about Chief

Lakoski's appointment, and no due process violation occurred in that regard. Kersey v. Shipley, 673 F.2d 730, 733 n.5 (4th Cir. 1982).

2. Petitioners' contention that Chief Lakoski was "adverse" has no basis in fact.

Petitioners next assert that they were deprived of due process because Chief Lakoski testified "adversely" to them at the procedural guarantees panel hearing. The record itself is utterly devoid of evidence of how or what the "adverse" testimoney was: Chief Lakoski merely stated that there was a panel hearing (Vol. I, p. 113); Colonel Shipley stated that he "testified" at the panel hearing (Vol. I, p. 212); petitioner Kersey testified at trial only that his attorney

elected to go under the Law Enforcement Officers' Procedural Guarantees (Vol, II, p. 376); petitioner Freemen briefly stated at trial that Chief Lakoski and Colonel Shipley both testified at the panel hearing (Vol. II, p. 491). The so-called "adverse" testimony asserted by petitioners was nothing more than the undisputed fact that both Chief Lakoski and Colonel Shipley testified at the Procedural Guarantees panel hearing; petitioners' characterization of Chief Lakoski's testimony as "adverse" finds no support in the record.

3. Petitioners were advised of the reasons Chief Lakoski declined to accept the panel's advisory recommendations.

Finally, petitioners assert that "because the Chief overruled the panel

decision without any statement as to the reasons for such a decision or upon which evidence he relied, a mockery has been made of our free society's ultimate guarantee [due process]". (Petitioners' Brief, p. 23). Such an assertion misconstrues the cases upon which petitioners rely and clearly goes against the express language of the procedural guarantees statute, which petitioners do not here challenge.

Relying upon Jarecha v. Immigration and Naturalization Service, 417 F.2d 220 (5th Cir. 1969), petitioners suggest that the Chief was required to write a formal opinion or state in detail the reasons for not following the recommendation of the advisory panel. The Fifth Circuit stated in Jarecha that the

requirements of due process, beyond notice and hearing, "are met if the written decision of the administrative agency or the record of the administrative hearing set out clearly the ground which forms the basis for the denial of discretionary relief . . . ." 416 F.2d at 225. Following the panel hearing, Chief Lakoski reviewed the transcript of that hearing, as well as all the other evidence concerning petitioners' refusal to obey the direct order to take the polygraph examination, and stated in a letter to petitioners, "[I]t is my decision that you did disobey a direct order of the Acting Chief of Police. . . . Therefore, the decision that was rendered to you on May 22, 1979, that your employment with the Chesapeake Police Division terminated that date, is

still in effect." (Agreed Ex. 8, 8A; Vol. I, p. 115-116). Because the record clearly discloses that Chief Lakoski stated the reasons for his decision, petitioners' reliance upon Jarecha is misplaced.

Moreover, because the singular question presented to the panel was whether petitioners had disobeyed a direct order, and further because it was uncontradicted that a direct order was given, that the order was not followed, and those reasons were given to petitioners in the July 24th letters, (Agreed Ex. 8, 8A; Vol. I, p. 103-107, 114-116), there is nothing to suggest that Chief Lakoski's decision to uphold petitioners' termination was arbitrary and capricious.

B. The District Court did not err in granting respondents' motion for directed verdict at the conclusion of petitioners' evidence.

Petitioners assert that a factual question existed as to the arbitrariness or capriciousness of Chief Lakoski's decision not to follow the hearing panel's recommendation or that it was not supported by reasonably substantial or probative evidence. Petitioners overlook the undisputed facts, which are not here challenged: (1) they were give a valid order; (2) they refused to obey the order; (3) they were advised that their refusal to obey that order could result in termination of their employment. Consequently, following a review of all of the available evidence, Chief Lakoski had no alternative but to determine that petitioners did, in fact, disobey the direct order, and therefore he was justified in terminating their employment. Himmelbrand v.

Harrison, 484 F.Supp. 803, 808 n.9 (W.D. Va. 1980).

With respect to the Procedural Guarantees panel hearing, petitioners admit that all steps taken complied with the Procedural Guarantees statute. The Chief was entitled to and did appoint one member of the panel; petitioners themselves appointed one member of the panel. The Chief, as the person responsible for the termination of petitioners' employment, testified at the panel hearing. Thereafter, Chief Lakoski, as was his right under Va. Code § 2.1-116.7 (Repl. Vol. 1979), rejected the recommendation of the panel. Petitioners had, after all, disobeyed a direct order, a fact which they concede.

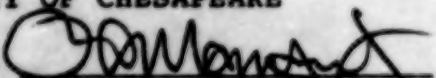
Under the attendant circumstances, the only inference to be drawn from Chief Lakoski's actions is that his decision was regular and not arbitrary or capricious, and was supported by reasonable, more than substantial, and probative evidence. Taking the circumstances as a whole, as the district court found and the circuit court affirmed, no Constitutional issue of due process deprivation was shown by petitioners' evidence. Chief Lakoski acted strictly in accordance with the Law Enforcement Officers' Procedural Guarantees statute, and the district court did not err, for the reasons stated in the opinion of the Fourth Circuit Court of Appeals, in directing the verdict in favor of respondents at the conclusion of petitioners' evidence.

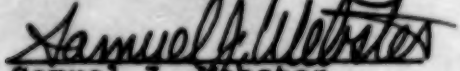
CONCLUSION

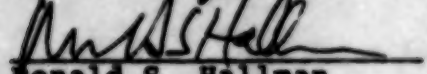
Respondents therefore respectfully request that the petition for writ of certiorari be denied and that the decisions of the Court of Appeals for the Fourth Circuit and of the District Court for the Eastern District of Virginia be affirmed.

Respectfully submitted

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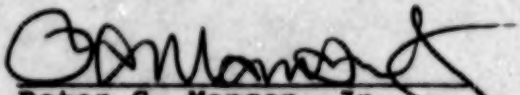
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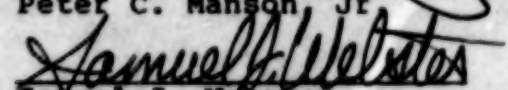
CERTIFICATE OF SERVICE

We hereby certify that we have served a copy of this Brief upon counsel for the Petitioners, Robert M. White, WHITE and SELKIN, 1110 United Virginia Bank Building, Five Main Plaza East, Norfolk, Virginia 23510, by depositing three copies of said Brief in the United States mail, properly addressed and return receipt requested, with sufficient postage thereon to insure delivery.

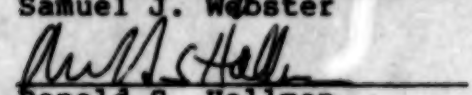
We hereby cetify that all parties required to be served have been served on or before the 20th day of July, 1982.



Peter C. Manson, Jr.



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